IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1105

ANTHONY HERBERT,

Petitioner,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE and CBS INC.,

Respondents.

REPLY BRIEF OF PETITIONER

JONATHAN W. LUBELL
MARY K. O'MELVENY
AUDREY J. ISAACS
COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
1370 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

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Pursuant to Rule 24 Sub.Div. 4, U.S.C.C. Rules, Petitioner respectfully submits this reply brief in connection with the argument first raised in the brief of respondents that the Petition should be denied because the matter is not ripe for review by this Court.

In support of their position respondents argue that other judicial considerations of the same issue should be allowed to develop prior to this Court's review. (Reply Br. p. 12) Such considerations as have been given to the Court of Appeals decision by other courts underline the appropriateness of review by this Court at this time. In *Jenoff* v. *Hearst,* No. H475-962 (D. Md. 1978).* Judge

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* Transcript of oral opinion, January 20, 1978, pp. 6-7.

Alexander Harvey II stated his disagreement with Chief Judge Kaufman's opinion and noted his support of Judge Meskill's analysis:

> Finally, let me say that if this case did squarely present the question as to whether *Herbert* should apply, my answer would be no. A careful reading of the *Herbert* opinion and of the District Court's opinion indicate that this is an extremely unique doctrine carved out of the whole cloth by Chief Judge Kaufman of the Second Circuit, and not even entirely agreed upon by the concurring judge, Judge Oakes. So at this juncture, two Federal Judges in New York recognize such a privilege but in different ways, and two do not. The Supreme Court cases cited in *Herbert* v. *Lando* do not, in my opinion, recognize any such privilege in a case of this sort.

I would agree completely with the dissent of Circuit Judge Meskill, and he sums up his position at the outset in the following language:

> In this action, Anthony Herbert alleges that he has been libeled by Barry Lando, Mike Wallace, C.B.S. and Atlantic Monthly. Under *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), he may prevail if he proves that the defendants acted with "actual malice," that is, knowing or reckless disregard of the truth. The major purpose of this lawsuit, therefore, is to expose the defendants' subjective state of mind—their thoughts, beliefs, opinions, intentions, motives and conclusions—to the light of judicial review. Obviously, such a review has a "chilling" or deterrent effect. It is supposed to. The publication of lies should be discouraged. The discovery by a libel plaintiff of an editor's state of mind will not chill First Amendment activity to any greater extent than it

> is already being chilled as a result of the very review permitted by *New York Times* v. *Sullivan.* The majority's attempt to eliminate or reduce that chill is supportable in neither precedent nor logic.
>
> Thus, if it were necessary here to decide the question, * * * I would not apply the rule stated in the *Herbert* case.

Neither the fact that the decision below resulted in a remand to evaluate the open questions in light of the absolute privilege of non-disclosure of editorial judgment created by the Court of Appeals (Reply Br. p. 9) nor the usual broad powers of the lower court over discovery matters militates against review at this time. The inapplicability of these factors to the present need for review is indicated in the argument pressed by respondents themselves before the Court of Appeals in their Petition for Leave to Appeal to that court:

> This case comes to this Court in a particularly appropriate context for certification of an interlocutory appeal. The decision below is one of "first impression." (Op. at 2) Although it is a ruling on a Rule 37 motion, it does not involve the commonplace exercise of discretion by a District Court in weighing on a question by question basis competing considerations of, for example, relevance and burdensomeness; nor is it one of a series of rulings as to the scope of a recognized—or previously rejected—privilege; it is, instead, a broadly phrased ruling that as a matter of law in cases governed by *Sullivan,* "liberal" discovery *must* be permitted into the editorial decisionmaking process of the press.*

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* Petition for Leave to Appeal from an Interlocutory Order, March 4, 1977, p. 6.

The same analysis is applicable to the broadly phrased ruling of the Court of Appeals that as a matter of law in cases governed by *Sullivan* discovery *cannot* be permitted "into the editorial decision-making process of the press."

Respondents further urged in their earlier Petition below, in words even more applicable to the present decision of the Court of Appeals:

> In any event, the decision will undoubtedly affect every *Sullivan* case and there is surely little reason to doubt the judgment of the National News Council that the issues dealt with within the opinion are " 'of major portent for the press, the law and the public at large.' " (*New York Times,* January 27, 1977, p. 22, col. 2, at col. 4).*

In *Reliance Insurance Company* v. *Barron's,* 76 Civ. 4094-CLB (S.D.N.Y. Nov. 18, 1977),** Judge Charles L. Brieant, in adhering to the District Court's grant of summary judgment upon reargument, described the impact upon *Sullivan* plaintiffs of the decision below:

> * * * since *Herbert,* defendants in defamation actions may not even be examined under oath before trial as to how they "formulated [their] judgments" (Slip op. at 232). If not before trial, then not at trial, since the same reasoning used in *Herbert* with respect to pretrial testimony must in logic apply to testimony at trial.
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> * * *
>
> In light of *Herbert,* and in view of the recent denial by the Supreme Court of *certiorari* in *Hotchner* v. *Castillo-Puche,* 551 F.2d 910 (2d Cir.), *cert. denied,* 46 U.S.L.W. 3202 (October 4, 1977), practical litigants may

* *Ibid.,* at pp. 6-7.

** Unofficially reported at 3 Med. L.Reptr. 1591.

well conclude that any remedy for libel against a journalist by a public figure is now illusory.

A judicial remedy for defamation was regarded, since the earliest days of the common law, as necessary because of the "supposed tendency [of libel] to arouse angry passion, provoke revenge and thus endanger the public peace." *Regina* v. *Holbrook,* 4 Q.B.D. 42, 46 (1878). Are men and women of honor who happen to be public figures to right vicious slanders hereafter by resort to fisticuffs or duelling? *Naturam expellas furca, usque tamen recurret.* Horace, *Epistles* I, 10.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. LUBELL
MARY K. O'MELVENY
AUDREY J. ISAACS
COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Attorneys for Petitioner

* Compare respondents' statement in their brief (p. 12) that experience with the approach of the Court of Appeals will illustrate "that that approach does afford plaintiffs an adequate opportunity to prepare and present a case for liability in a *Sullivan* context."